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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY GARCIA, Defendant and Appellant.	E063747 (Super.Ct.No. FVI1402202) OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed.

William Paul Melcher, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General and Scott C. Taylor, Deputy Attorney General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL HISTORY[1]

On June 17, 2014, a complaint charged defendant and appellant Anthony Garcia with first degree robbery under Penal Code[2] section 211 (count 1); assault with a firearm under section 254, subdivision (a)(2) (count 2); and possession of a firearm by a felon under section 29800, subdivision (a)(1) (count 3). The complaint also alleged that defendant committed these crimes for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C).

On October 27, 2014, defendant pled no contest to an amended charge of second degree robbery and admitted the gang enhancement. The trial court sentenced defendant to 36 months of supervised probation.

On January 20, 2015, the probation department filed a petition to revoke defendant's probation. At the probation revocation hearing on April 28, 2015, the court found that defendant violated probation term Nos. 3, 4 and 7. The court thereafter sentenced defendant to 12 years in custody.

Defendant filed a notice of appeal. For the reasons set forth below, we shall affirm the trial court's judgment.

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[1] The facts from the underlying conviction are not relevant to this appeal.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

DISCUSSION

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REVOKING DEFENDANT'S PROBATION

Defendant contends the trial court abused its discretion in revoking defendant's probation because there is no substantial evidence he willfully violated his probation terms.

In this case, on January 20, 2015, the probation department filed a petition alleging that defendant violated two terms of his probation: (1) that defendant report to his probation officer on a regular basis (probation term No. 3); and (2) that defendant cooperate with his probation officer (probation term No. 4).[3]

At the probation revocation hearing, Officer Melissa Latimer, defendant's probation officer, testified that defendant was released on October 27, 2014, and reported to probation on October 28, 2014. At that time, defendant received an orientation letter informing him to report back to probation on November 12, 2014. Officer Latimer testified that defendant failed to report back to probation as directed in the orientation letter.

Officer Latimer also testified that she interviewed defendant on March 25, 2015. During the interview, defendant initially told the officer that he tried to report to

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[3] Probation term No. 3 states that defendant must "[r]eport to the probation officer in person immediately upon release from custody and thereafter once every fourteen (14) days or as directed."

Probation term No. 4 states that defendant must "[c]ooperate with the Probation Officer in a plan of rehabilitation and follow all reasonable directives of the Probation Officer."

probation on three separate occasions. However, when the officer continued the questioning, he admitted that he "messed up" and forgot about the appointment. Defendant claimed that he was under stress since he was taking care of his family and had recently relocated. Defendant further admitted that he read the orientation letter that he received on October 28, 2014, and was aware of his obligation to report back to probation. After Officer Latimer's testimony, the trial court found defendant in violation of his probation.

"Our trial courts are granted great discretion in determining whether to revoke probation." (*People v. Rodriguez* (1990) 51 Cal.3d 437, 445.) The level of certainty required to support a probation revocation is less than that required to support a criminal conviction. Section 1203.2, subdivision (a), authorizes probation revocation "if the interests of justice so require and the court, in its judgment, has reason to believe . . . that the [probationer] has violated any of the conditions of his or her supervision . . . ." The California Supreme Court has interpreted "reason to believe" under section 1203.2, subdivision (a), to impose a "preponderance of the evidence" standard of proof. (*Rodriguez*, at p. 445.) A lower threshold is appropriate because "'[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special [probation] restrictions.'" (*People v. Coleman* (1975) 13 Cal.3d 867, 877, fn. 8.)

An appellate court will not disturb a decision to revoke a defendant's probation unless it finds the trial court abused its discretion. (*People v. Kelly* (2007) 154 Cal.App.4th 961, 965.) "'[O]nly in a very extreme case should an appellate court

interfere with the discretion of the trial court in the matter of denying or revoking probation . . . .'" (*People v. Rodriguez*, *supra*, 51 Cal.3d at p. 443.) "A trial court abuses its discretion by revoking probation if the probationer did not willfully violate the terms and conditions of probation." (*People v. Galvan* (2007) 155 Cal.App.4th 978, 983 (*Galvan*).)

"[W]here the trial court was required to resolve conflicting evidence [to determine whether a defendant violated the conditions of his probation], review on appeal is based on the substantial evidence test. Under that standard, our review is limited to the determination of whether, upon review of the entire record, there is substantial evidence of solid value, contradicted or uncontradicted, which will support the trial court's decision. In that regard, we give great deference to the trial court and resolve all inferences and intendments in favor of the judgment. Similarly, all conflicting evidence will be resolved in favor of the decision." (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848-849, fns. omitted.)

In this case, after the trial court heard Officer Latimer's testimony, it found defendant in violation from the terms of his probation. As provided *ante*, defendant knew that he had to report back to his probation officer. He, however, failed to comply. According to defendant's own words, "he 'messed up' and forgot about his orientation appointment." Hence, defendant's own admission shows that he willingly failed to follow the reasonable reporting directive of his probation officer. Because defendant knew what he was doing, and intended to do what he was doing, his actions were willful. Therefore, we find that the trial court properly revoked defendant's probation.

Notwithstanding, although defendant admits that he "failed to report as requested, the record is clear his failure to report was unintentional and resulted from his recent relocation and family care issues. The evidence, therefore, is insufficient to show [defendant] willfully violated the terms of his probation." In support of his claim, defendant relies on *Galvan, supra,* 155 Cal.App.4th 978 and *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438 (*Jerry R.*). Neither *Galvan* nor *Jerry R.* aid defendant.

In *Galvan,* the defendant was placed on probation and ordered to report to the probation office within 24 hours of his release from custody. He was also ordered to report to the probation office within 24 hours of his reentry into the United States if he left the country. The defendant did not appear for a probation violation hearing because he had been deported to Mexico immediately after his release from jail. There was no evidence in the record to show when he had returned to the United States. The Court of Appeal, therefore, determined that the evidence was insufficient to show that he willfully failed to comply with the reporting requirements. (*Galvan, supra,* 155 Cal.App.4th at pp. 980-984.)

Galvan relied on *People v. Zaring* (1992) 8 Cal.App.4th 362 (*Zaring*). In *Zaring,* the trial court had ordered the defendant to appear in court the following day at 8:30 a.m. The next day, the defendant was 22 minutes late. At her probation revocation hearing, the defendant explained that she had arranged for a ride to court (she lived 35 miles away), but that the ride fell through at the last minute because of a childcare problem. (*Zaring,* at pp. 365-366, 376-377.)

The Court of Appeal in *Zaring* held that the trial court had abused its discretion in revoking probation. It determined that the defendant's violation had not been willful: "Certainly, it cannot reasonably be concluded that Judge Broadman expected the appellant to 'camp' outside the courtroom until 8:30 in the morning. Neither can it reasonably be concluded that had appellant had an accident or mechanical failure of her vehicle that such conduct would not be excusable. In other words, the discretion that the trial court is empowered to use is predicated upon reason and law but is primarily directed to the necessary end of justice. . . . [¶] . . . [¶] [A]ppellant was confronted with a last minute unforeseen circumstance as well as a parental responsibility common to virtually every family. Nothing in the record supports the conclusion that her conduct was the result of irresponsibility, contumacious behavior or disrespect for the orders and expectations of the court. [W]e cannot in good conscience find the evidence supports the conclusion that the conduct of appellant, even assuming the order was a probationary condition, constituted a willful violation of that condition." (*Zaring*, *supra*, 8 Cal.App.4th at pp. 378-379, fns. omitted.)

In *Jerry R.*, the defendant was charged with willfully discharging a firearm in a grossly negligent manner in violation of section 246.3. The juvenile court found the allegation true even though there was no evidence that the defendant knew the firearm was loaded at the time. (*Jerry R.*, *supra*, 29 Cal.App.4th at p. 1436.) The appellate court reversed, holding that willful, in the context of section 246.3, required a showing that the defendant intended to actually fire the weapon, not that he merely pulled the trigger. (*Jerry R.*, at p. 1439.)

The instant case is significantly different from *Galvan*, *Zaring*, and *Jerry R.* Unlike *Galvan*, defendant was not deported or detained against his will. Rather, he simply forgot to attend his appointment. When defendant was granted probation, defendant had a responsibility to ensure his compliance with his probation terms. He cannot simply "forget" about his duties because life gets complicated. Thus, unlike *Galvan*, there is evidence here to show that defendant was aware of his probation officer's reasonable directives, and was capable of abiding by those directives but failed to do so. Moreover, unlike *Zaring*, there was nothing in the evidence to show that defendant did everything in this power to ensure that he would comply with his probation terms. Hence, in contrast to *Zaring*, here, we may conclude that defendant's failure to fulfill the terms of his probation was "the result of irresponsibility, contumacious behavior or disrespect for the orders and expectations of the court." (*Zaring*, *supra*, 8 Cal.App.4th at p. 379.) Furthermore, *Jerry R.* does not aid defendant either because it does not discuss the term "willful" in the context of a probation violation. Instead, the court focused on the specific language and legislative intent of section 246.3 when rendering its decision. (*Jerry R.*, *supra*, 29 Cal.App.4th at pp. 1438-1440.) There is no mention of section 1203.2 or any discussion of probation violations. Moreover, *Jerry R.* defines "willful" in the context of a defendant who actively commits a prohibitive act. (*Jerry R.*, at p. 1438.) Here, defendant did not commit a prohibitive act. Instead, he failed to comply with a mandated duty under the terms of his probation.

Based on the foregoing, we hold that the trial court did not abuse its discretion in finding that defendant violated the terms of his probation.

B. DEFENDANT WAS NOT PREJUDICED WHEN THE COURT FOUND HIM IN VIOLATION OF PROBATION TERM NUMBER SEVEN

Defendant contends that his due process rights were violated because he was never provided notice of an allegation that he violated probation term No. 7. The People contend that defendant has forfeited this claim because defense counsel failed to object to the lack of notice. We need not address the forfeiture claim because defendant's claim fails on the merits.

In this case, when the probation officer filed the petition to revoke defendant's probation, the petition alleged that defendant violated probation term Nos. 3 and 4. The petition failed to allege a violation of probation term No. 7—that defendant report his current address to his probation officer and inform his probation officer if he relocates.

During defendant's probation revocation hearing, the court asked Officer Latimer about probation term No. 7. The officer testified that the probation term required defendant to maintain a permanent address with the probation department. She also testified that defendant said he did relocate and he failed to report the new address to the probation department. Defense counsel raised no objections to these questions. At the completion of the officer's testimony, the court found defendant in violation of probation term Nos. 3, 4, and 7.

Generally, a defendant should receive written notice of the claimed violations of probation. (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 786, citing *Morrissey v. Brewer* (1972) 408 U.S. 471, 489.) Reviewing courts should remand only if "it is reasonably probable that a result more favorable to the [defendant] would have been reached in the

absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Prejudice is not presumed merely because the trial court failed to comply with all due process requirements. (*In re La Croix* (1974) 12 Cal.3d 146, 154.) In order to demonstrate prejudice, the defendant must demonstrate that receiving proper notice would have allowed him to challenge the claims made during the hearing and change the final outcome. (*Ibid.*)

Here, the trial court's error was harmless because the evidence presented to establish probation violations at the hearing was overwhelming and undisputed. As provided above, Officer Latimer testified that defendant admitted he relocated without notifying probation. Moreover, Officer Latimer testified that defendant failed to report his new address to her. Defendant told the officer that he attempted to contact probation on three separate occasions but did not present any evidence to support this claim. Additionally, defendant later admitted that he "messed up" and forgot about reporting back to probation. Defendant provides no argument that he could have done anything to challenge the factual claims made against him by Probation Officer Latimer at the hearing. Since having notice of the probation term No. 7 violation would not have changed the final outcome of defendant's probation hearing, the error was harmless beyond a reasonable doubt. Additionally, the lack of notice was harmless because the court found defendant in violation of probation term Nos. 3 and 4. Failure to follow any of the probation conditions indicates a defendant is incapable of complying with authority and justifies revoking probation. (§ 1203.2, subd. (a); see also *Black v. Romano* (1985) 471 U.S. 606, 624, fn. 21.)

Notwithstanding, defendant claims that without finding a violation of probation term No. 7, the court would have followed Officer Latimer's recommendation and reinstated probation. We disagree. There is nothing in the record to indicate that the trial court would not have revoked probation without finding that he violated term No. 7. Here, the trial court revoked defendant's probation even though it was fully aware of Officer Latimer's recommendation. Given how term Nos. 3, 4, and 7 are similar because all three conditions required defendant to maintain communication with his probation officer, and defendant failed to comply, it is inconceivable that finding a violation of term No. 7 was the dispositive factor in revoking his probation.

In sum, we find any alleged lack of notice harmless because it is not reasonably probable that a result more favorable to defendant would have been reached had he been given notice of violating probation condition number 7.

DISPOSITION

The judgment is affirmed.

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MILLER
Acting P. J.

We concur:

CODRINGTON
J.

SLOUGH
J.